SCC No. 39340

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

B E T W E E N:

LAW SOCIETY OF SASKATCHEWAN

APPELLANT
(Respondent)

- and -

PETER V. ABRAMETZ

RESPONDENT
(Appellant)

- and -

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FACTUM OF THE INTERVENER, THE LAW SOCIETY OF MANITOBA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND THE INTERVENER'S POSITION

1. The Law Society of Manitoba ("LSM") intervenes to put forward the perspective of a smaller, member-funded regulatory body with a broad and independent jurisdiction to identify and act in the public interest.

2. LSM submits that whatever test emerges from this case should allow for consideration of the particular legislative mandate and operational realities of the affected regulator. The approach to judging operational decisions is properly informed by the extent to which the Legislature has delegated to the regulator the authority to independently make determinations as to the public interest. A decision allocating resources as between competing demands is an aspect of the delegated authority to determine what is required in the public interest and such a decision, reasonably made with regard to that interest, is entitled to deference so long as it is not the cause of irremediable unfairness to the member.

3. As to the standard of review of the application and interpretation of rules and codes of conduct enacted by a regulator, LSM's position is this: regard is properly had to the extent that those rules and codes are enacted by the regulator pursuant to a mandate to independently determine what is in the public interest.

PART II – THE QUESTION IN ISSUE

4. This appeal is about whether the framework for responding to allegations of undue delay in regulatory proceedings established in *Blencoe*[1] requires modification or replacement. While *Blencoe* has been applied across the spectrum of administrative bodies, the case now before the Court arises in the particular context of disciplinary proceedings conducted by a relatively small member-funded regulator of the legal profession. LSM's submissions are to bring focus to issues that arise in that particular context.

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[1] *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, 2000 SCC 44 (*Blencoe*)

PART III – ARGUMENT

A. Delay

5. For reasons well-argued by the Appellant and by other Interveners, LSM's position is that the *Blencoe* framework requires no modification at all. It allows for account to be taken of the public interest in effective and independent resolution of allegations of professional misconduct and for appropriate deference to operational decisions made by regulators. It balances the rights of the person facing such allegations to a fair hearing and responds to harm outside of that process caused by undue delay.

6. The present case illustrates that a just result depends on the application of *Blencoe* principles to the facts such as they may be properly found, and on which LSM takes no position. The present case does not raise any need for a change in the legal framework.

The Requisite Contextual Approach

7. LSM submits that, as this Court recognized in *Blencoe*, the determination of whether there has been undue delay is properly based on contextual factors.[2] In the most general sense, delay considerations applicable to regulatory proceedings are distinct from those that apply to criminal proceedings as reflected in the *Jordan*[3] line of cases, and from those that apply to civil proceedings as reflected in *Hryniak*[4]. The presumptive ceilings imposed by *Jordan* are appropriate because they apply to one legal setting where there is a uniform constitutional compulsion imposed on the government in respect of persons charged with a criminal offence. Conversely and as in *Hryniak*, when a private litigant in a civil suit chooses to let their case sit, or to engage in disproportionate proceedings, that choice is a self-interested one that affects only the immediate parties and for which a risk of pre-set consequences is one the responsible party assumes only for itself.

8. However, when a regulator decides to apply resources more immediately to one matter over another, it makes a judgment based on the public interest as to relative urgency of those matters. Smaller, member-funded regulators should not be assumed to have the same flexibility to

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[2] *Blencoe*, para 122
[3] *R v Jordan*, [2016] 1 SCR 631, 2016 SCC 27 (*Jordan*)
[4] *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 (*Hryniak*)

absorb spikes in demands on resources as do others. They are not - and in the case of the legal profession, ought not to be - funded by government.

9. It cannot be assumed without specific inquiry that a delay in one case while limited resources are directed to another one that is reasonably adjudged more urgent or resource intensive is the result of a failure to commit sufficient resources as opposed to a temporary allocation to react to an unusual situation pending acquisition of additional resources, human and financial. For smaller, member-funded regulators, advance budgeting to meet unanticipated demands such as those required for inordinately large investigations or discipline files is not realistic. Rather, the existing budget must be temporarily reallocated to reflect the necessary shift in priorities, guided by the regulator's determination as to what is in the public interest in the given circumstance.

10. Where there is an allegation of undue delay in a regulatory proceeding, it is appropriate for a reviewing court to consider such contextual factors as the nature of the regulated activity, the purpose of the process and the nature of the regulator.

-The Nature of the Regulated Activity

11. One purpose assigned by the Legislature to regulators of the legal profession is to uphold and protect the public interest in the delivery of independent legal services[5]. The independence of the legal profession is "a hallmark of a free and democratic society." As this Court has said:

> The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.[6]

12. As discussed below, there is a very limited role preserved for government in the regulation of the legal profession. For the purposes of regulating the legal profession, law societies have a statutory mandate to determine the public interest independent from government. Consistent with this independence model, law societies are funded by their members, rather than by government.

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[5] e.g., *The Legal Profession Act*, CCSM c. L107, s 3, ("*The Legal Profession Act"*) and as to this case: *The Legal Profession Act, 1990*, SS, c. L-10.1, s 3.1

[6] *A.G. Can. v. Law Society of B.C.*, [1982] 2 SCR 307, 1982 CanLII 29 at pp. 335-336

-The Purpose of the Process

13. The particular purpose of the body in question is a contextual factor in assessing allegations of undue delay. Different administrative and regulatory bodies have different mandates; some look more like civil proceedings where the rights and responsibilities as between participants are determined while others are instruments of upholding specific or particular aspects of government policy. Regulators of professions are to varying extents, primarily charged with determining what is in the public interest and applying that determination.

14. The purpose of law society adjudicative proceedings is to uphold and protect the public interest.[7] The public interest is largely defined by rules and guided by codes of conduct independently established or adopted by the regulator for that purpose.

-The Nature of the Regulator

15. Like other regulators, law societies derive their authority from statute. They are not, however, instruments of specific aspects of government policy, as for example, are Human Rights Commissions (as in *Blencoe*), Competition Regulators, Product Marketing Boards, Utilities Regulators, Product Safety Regulators and many other administrative decision makers. Law societies are independent policy makers in specific areas with broad mandates to determine public interest. The essential government policy reflected in their home statutes is just that; it is the law societies who are to determine the requirements of the public interest within their sphere of regulation. As observed by this Court, in that regard they have some similarities to municipal authorities.[8]

16. This Court has long recognized that law societies are to be left to govern the profession independently. In *Law Society of British Columbia v. Trinity Western University*, the majority concluded, at para. 38:

> In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise,

[7] G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters, 2021)(loose leaf updated 2021, release 2) at 26:1
[8] *Green v. Law Society of Manitoba*, [2017] 1 S.C.R. 360, 2017 SCC 20, at para 21

follows from the breadth of the "public interest", and promotes the independence of the bar. [9]

17. The difference in degree of independence granted to law societies as opposed to bodies charged with carrying out government policy is illustrated by a comparison of LSM's governing legislation, *The Legal Profession Act*, with the statute governing the Manitoba equivalent of the subject of the *Blencoe* case: *The Human Rights Code*[10].

18. Under *The Human Rights Code*, all members of the Manitoba Human Rights Commission are appointed by the Lieutenant Governor in Council, as are all adjudicators. The Commission is responsible to a designated Minister of the Crown for its administration of *The Human Rights Code*, and must report annually to the Legislature through the Minister. Regulations may be made by the Lieutenant Governor in Council as it considers necessary for carrying out the objectives of *The Human Rights Code*, and for specific policy ends. All such Regulations are subject to *The Statutes and Regulations Act*[11].

19. In contrast, under *The Legal Profession Act*, the governing board of LSM, the Benchers, is comprised of: members elected by the professionals it governs, members appointed by those elected Benchers and public representative Benchers, who are appointed by an independent committee of which the Attorney-General of Manitoba is but one of three members. The Benchers have a general power to "make rules to manage the society's affairs, pursue its purpose and carry out its duties." LSM's purpose is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence and its duties are to regulate the practice of law in Manitoba.[12]

20. In conduct matters, it is the Benchers who are charged with populating the Complaints Investigation Committee and establishing the processes for investigating complaints. The Benchers also populate the Discipline Committee and make rules as to its procedures. The *Code of Professional Conduct* is enacted by the Benchers. The Rules and *Code* provisions so enacted

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[9] [2018] 2 S.C.R. 293, 2018 SCC 32, and see also at paras 110, 155
[10] *The Human Rights Code*, CCSM c. H175
[11] *The Statutes and Regulations Act*, CCSM, c. C207, s. 8; *The Human Rights Code*, ss. 2, 6, 8, 63
[12] *The Legal Profession Act*, ss. 3 – 10

are instruments of the society's policies binding upon its members, and not of government policy. They are not subject to *The Statutes and Regulations Act* or to any governmental approval.[13]

21. Even as between regulators of professions, there are differences that may be important contextual factors in a given circumstance. For example, under *The Regulated Health Professions Act*, regulators (known as colleges) are given similar powers to create codes of ethics but these are required to be reviewed by the designated Minister. The Minister is empowered to appoint persons to a college's governing council if the Minister considers it to be in the public interest to do so. Regulations must be approved by the Lieutenant Governor in Council before coming into force and a code of conduct may not be adopted before considering the comments of the Minister. [14]

22. Membership in a regulated profession requires payment of fees to the governing body to finance the regulator's operations. There is no provision for funding of operations by government; this is an aspect of independence. Under *The Regulated Health Professions Act*, a College must annually provide a financial report to the Minister.[15] No such reporting is required under *The Legal Profession Act*.

B. The Standard of Review

23. There are distinct aspects of a regulator's function that might come up for review as a result of a disciplinary or other adjudicative matter. They are at least these:

a. Interpretation of statutory authority and laws of general application;

b. Interpretation of Rules and provisions of a Code of Conduct;

c. Operational decisions.

24. As explained in *Vavilov*, in cases other than those in which the Legislature has indicated otherwise, the standard of review of dispositive administrative decisions is reasonableness[16]. The Legislature is seen to have indicated otherwise when it has provided for an appeal, which signals

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[13] *The Legal Profession Act*, ss. 16, 43, 64-68, 70
[14] *The Regulated Health Professions Act*, CCSM, c. R117, ss. 8 – 13, 22, 82 - 83
[15] *The Regulated Health Professions Act*, s. 142
[16] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*)

that the ordinary appellate standards of review as set out by this Court in *Housen v. Nikolaisen* apply.[17] The applicable standard depends on the nature of the question.

25. It is clear that where the nature of the question in a statutory appeal is a pure or extricable question of law, including of interpretation of the body's home statute, the standard of review is correctness. Such questions, it may be observed, involve interpretation of laws imposed upon the regulatory body by the Legislature or by the common law. Rules and codes are not that; they are expressions of the regulator's own determination as to what is necessary in the public interest.

26. Where the nature of the question is the interpretation or application of rules and codes of conduct enacted or adopted by the regulator in the discharge of its delegated Legislative authority, it is respectfully submitted that, contrary to the Court of Appeal's approach, a deferential standard is properly applied. This is because:

a. just as when the validity of the delegated legislative enactment is challenged, it is consistent with the Legislature's intent to delegate jurisdiction over the subject matter of the rules and code to the regulator; and

b. the rule or code provision has been created pursuant to a delegated authority to make such enactments in the public interest as determined by the regulatory body, rather than in furtherance of a policy or program of government.

27. In situations such as those applicable to LSM, this is emphasized by the delegation of legislative authority without supervision, review or other oversight by the Legislature or Lieutenant Governor in Council. One example is that the very definition of what constitutes "professional misconduct" or "conduct unbecoming" or "incompetence" has been entirely delegated to LSM, as these terms are not defined in *The Legal Profession Act*. The Legislature has properly chosen to take a hands-off approach as to what is in the public interest.

28. In any event, the *Code of Professional Conduct* makes clear that its purpose is not to enact a comprehensive set of rules with pre-determined levels of relative importance but "to assist governing bodies and practitioners alike in determining whether in a given case the conduct is

[17] [2002] 2 SCR 235, 2002 SCC 33

acceptable, thus furthering the process of self-government" and is "to be understood and applied in light of its primary concern for the protection of the public."[18]

29. In these circumstances, where a broad public interest mandate has been delegated to the regulatory body, deference is due. As this Court held in *Pearlman*, the Manitoba Legislature "manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected."[19]

30. Such a deferential standard is consistent with the recognition in *Vavilov*, albeit in another context, that, legislative intent may be found in the language used by the Legislature to describe a decision maker's power. It was observed that:

> ....where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language.[20]

C. Conclusion

31. Whether legislative, adjudicative or operational, decisions made in the exercise of discretion to determine and act in the public interest are entitled to deference.

32. Operational decisions in allocating human and financial resources in a particular set of circumstances may be entirely reasonable and should be judged on that basis. The *Blencoe* framework readily accommodates all relevant factors in an assessment of whether there has been undue delay, and allows for consideration of any unique or specific circumstances which may arise in a given regulatory setting. It is flexible, contextual and adaptable to the many regulatory and administrative contexts to which it applies. It does not require adjustment.

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[18] The Law Society of Manitoba, *Code of Professional Conduct,* Preface, p. 9; See also: Law Society of Saskatchewan, *Code of Professional Conduct,* Preface, p. 9

[19] *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 1991 CanLII 26 at p 888

[20] *Vavilov* at para 110

PART IV – COSTS

33. LSM does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September, 2021.

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PART V – TABLE OF AUTHORITIES & LEGISLATION

Case Law	Paragraph(s)
A.G. Can. v. Law Society of B.C., [1982] 2 SCR 307	11
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